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No. 95-1081

In The

Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE ASBESTOS VICTIMS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE ASBESTOS VICTIMS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Asbestos Victims of America ("AVA"), a national, nonprofit organization representing over 20,000 asbestos victims and their families, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court. This case is of significant interest to the AVA, which serves thousands of asbestos victims and their survivors throughout the United States. The AVA assists with the medical, legal, and emotional problems caused by asbestos disease, by preventing future disease through increasing public awareness of the hazards of asbestos exposure, and by ensuring that asbestos abatement procedures eliminate the hazard, rather than create new ones. The AVA is a total support and information center for those suffering from or concerned with asbestos exposure.

Remaining current with information on the state of the law throughout the nation, as it affects asbestos victims, is an AVA priority. Moreover, taking all available steps to ensure that the state of developing law provides compensation to victims who have lost, or are losing, their lives because of asbestos exposure is a critical imperative for the AVA. This case, therefore, attracted our fervent attention. If the Fifth Circuit's decision is reversed, asbestos workers and their families will lose needed compensation, while employers will enjoy an undeserving windfall, contrary to the humanitarian purposes and goals of the Longshore and Harbor Workers' Compensation Act. The AVA urges this Court to consider

its arguments and concerns for the welfare of thousands of asbestos victims and their families.

SUMMARY OF ARGUMENT

A. Correct statutory construction of § 33(g) of the Longshore and Harbor Workers' Compensation Act (LHWCA or "the Act"), 33 U.S.C. § 933(g), is at issue here. Competing interpretations are presented by the employer and longshore claimant: one which unfairly benefits employer and needlessly harms injured workers and their families, versus one which protects the *viable* interests of both employers and longshore claimants. Resolution of this issue is controlled by the U.S. Supreme Court's mandate to defer to the plain language of this statute (*Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992)).

This Court's *Cowart* decision adhered to its strict constructionist principles by confining the LHWCA's § 33(g) involuntary waiver of benefits to persons "entitled to compensation" (or those with vested rights) who enter into third party settlements without the employer's consent, despite the resultant "trap for the unwary." *Estate of Cowart v. Nicklos Drilling Co., supra*, 505 U.S. at 483. By so limiting this harsh forfeiture penalty, the court implicitly **excluded** from forfeiture, as § 33(g) itself does, persons then **not** "entitled to compensation" or not yet vested with rights to compensation.

B. The LHWCA's language acts as a guidepost, revealing Congress intended only employees and present claimants to be at risk of forfeiture, encouraging the

pursuit of **viable** actions against third party tortfeasors to achieve full compensation, while protecting the **vested** credit rights of employers. Straining the statutory limitation to persons not yet "entitled to compensation," i.e., the living employee's spouse and children, unfairly gives the employer ultimate approval over settlements of potential wrongful death actions by the employee's spouse, actions which currently have no value. This control is not enjoyed by the employer in the longshore forum, which prohibits settlements of potential death benefits, and was not envisioned in § 33 either.

C. The humanitarian policies inherent in the LHWCA from its inception preclude statutory interpretations which unfairly penalize longshore claimants while giving unfettered and undeserving windfalls to employers. Liberal construction is demanded of the LHWCA in favor of injured workers' recovery to further the Act's "humanitarian purpose," and to avoid "harsh and incongruous results." *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *accord, Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 315-316 (1993). In the absence of clear language requiring it, forfeiture of longshore benefits is not warranted by the Act.

I. ARGUMENT

A. Statutory Construction Principles Demand Affirmation

This Court must decide between conflicting interpretations of § 33(g). The Fifth Circuit below adhered to the plain language of § 33(g), which speaks "with great clarity to the precise question raised by this case." *Estate*

of Cowart v. Nicklos Drilling Co., supra, 505 U.S. at 483; that is, whether § 33(g)'s forfeiture provisions apply to a spouse at the time she entered into third party settlements but before she becomes a "person entitled to compensation." By contrast, the Ninth Circuit in *Cretan v. Bethlehem Steel Corporation*, 1 F.3d 843 (1994), looked beyond the narrow language of the statute, following instead its perceived policy concerns. Yet, the language of § 33(g) does not yield itself to *Cretan*'s more nebulous reading.

In both cases, the circuit courts addressed whether § 33(g)'s forfeiture provision barred a worker's spouse's entitlement to potential longshore death benefits when she joined her husband in entering into third party settlements without his employer's consent, before his death.[1]

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[1] Section 33(g) reads:

> (1) If the *person entitled to compensation* . . . enters into a settlement with a third person . . . for an amount less than the compensation to which the person . . . would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation. . . .
>
> (2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated. . . .

33 U.S.C. § 933(g) (emphasis added).

The Fifth Circuit below answered no, following the *Cowart* court's already provided definition of § 33(g)'s affected class of persons "entitled to compensation." There, this Court addressed whether a longshore employee, injured and claiming entitlement to longshore benefits at the time he entered into unapproved third party settlements, triggered § 33(g)'s forfeiture, framing the question as

> Whether Cowart, *at the time of the Transco settlement*, was a "person entitled to compensation" under the terms of § 33(g)(1) of the LHWCA.

Id. at p. 475 (emphasis added).

Cowart contended the key phrase, "person entitled to compensation," encompassed only those persons receiving compensation or recipient of a compensation award. In rejecting this argument, this Court found it need not look any further than the very language of the statute:

> The natural reading of the statute supports the Court of Appeal's conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor. Both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right. See, generally, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (discussing property interests protected by the due process clause and contrasting an entitlement to an expectancy); Black's Law Dictionary at 532 (6th ed. 1990) (defining "entitle"

> as "to qualify for; to furnish with proper grounds for seeking or claiming"). Cowart suffered an injury which by the terms of the LHWCA gave him a right to compensation from his employer. *He became a person entitled to compensation at the moment his right to recovery vested, not when his employer admitted liability, an event even yet to happen.* (Emphasis added.)

Estate of Cowart v. Nicklos Drilling Co., supra, 505 U.S. at 477.

The Fifth Circuit below followed *Cowart*'s adherence to § 33(g)'s plain language and clear meaning by deciding that the widow at issue, Maggie Yates, could not have been a "person entitled to compensation" subject to § 33(g)'s bar because at the time of the pre-death settlements, her claim for death benefits had not yet vested. Employer contested below, and here, this "natural reading" of § 33(g), presenting the Ninth Circuit's contrary decision, which in identical circumstances rejected this Court's definition of the term "person entitled to compensation," terming it merely *dicta*. Instead, the Ninth Circuit decided a widow and her daughter were persons "entitled to compensation" at the time they settled their civil settlements, before the worker's death, primarily in consideration of perceived purposes of § 33(f), 33 U.S.C. § 933(f). Section 33(f) provides that "if the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section," the employer will receive credit for the net amount recovered

against third persons.[2] The *Cretan* court rejected *Cowart*'s "person entitled to compensation" definition, arguing that *Cowart* did not consider "whether a claimant whose entitlement will mature upon a death that has not yet occurred is a 'person entitled to compensation.' " *Cretan v. Bethlehem Steel Corporation, supra,* 1 F.3d at p. 846. Unfortunately, the *Cretan* court erred in failing to abide

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[2] Section 33(f) states in full:

> (f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the net amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorney's fees).

§ 33(b) provides:

> (b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person, entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within 90 days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term "award" with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

by the clear language of § 33(g), and § 33(f), and in assuming that a claimant's entitlement will mature upon a death.

In interpreting § 33(g), this Court said it best:

> The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written.

Estate of Cowart v. Nicklos Drilling Co., supra, 505 U.S. at 476. Section 33(g), and § 33(f), do not address their provisions to persons "who may become entitled to compensation," but only to persons actually "entitled to compensation." Importantly, the critical time for considering if the person is encompassed within § 33(g)'s forfeiture provision is when the "person entitled to compensation . . . **enters** into a settlement with a third person."[3] Of course, "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson,* 112 S.Ct. 1351, 1354 (1992). Section 33(g) focuses on a person presently "entitled to compensation" actually entering into third party settlements. In other words, the clear language of the section addresses only those persons with present entitlement to longshore benefits, not those with a mere expectation. This Court emphasized the point when it held in *Cowart* that the person must have qualified for the right or benefit, "that the person satisfies the prerequisites attached to the right," citing to *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577

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[3] This Court agreed in *Cowart,* looking only to the time of the civil settlement in determining if § 33(g) considered the employee a "person entitled to compensation," see *Cowart* at p. 475.

(1972). See *Estate of Cowart v. Nicklos Drilling Co., supra,* 505 U.S. at 477. *Roth* held the 14th Amendment procedural due process protections did not require a hearing prior to the nonrenewal of a nontenured state teacher's contract, in the absence of proof that the nonrenewal deprived the teacher of any protected property or liberty interests. In discussing the distinction between an expectation and an entitlement, the Court's comments are telling:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Id. at p. 577. The Court concluded that the teacher had an "abstract concern in being rehired, but he did not have a property interest . . . " and thus did not suffer deprivation of liberty or property protected by the 14th Amendment. *Id.* at p. 578.

The *Cowart* court's reference to *Roth* is in complete accord with its requirement that a "person entitled to compensation" must be "vested" with rights. A right is "vested" when there is an ascertained person with a present right to present or future enjoyment (*Pearsall v. Great N.R. Co.,* 161 U.S. 646, 656-8 (1896)), that "has been so far perfected that it cannot be taken away by statute" (Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation* (1960) 73 Harv.L.Rev. 692, 696, 698), that it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice (*Cambell v. Holt,* 115 U.S. 620 (1885)).

By contrast, and in conflict with *Cowart*, the *Cretan* court engaged in a more malleable reading of the "person entitled to compensation" language, encompassing persons who could someday qualify for LHWCA benefits, or as the *Cretan* court said, claimants "whose entitlement will mature upon a death that has not yet occurred." *Cretan v. Bethlehem Steel Corporation*, 1 F.3d at p. 846. Of course, § 33(g)'s reference to only those persons "entitled" to compensation rejects the *Cretan* court's more expansive interpretation. Claimants whose entitlement matures upon a death do not become "entitled" to compensation until death, as the Ninth Circuit itself agreed in its 1979 *Todd Shipyards Corp. v. Witthahn*, 569 F.2d 899, 902 opinion, holding that injured workers' deaths give "rise to new claims for relief not in existence during their lifetimes. When they died, . . . their survivors' rights to death benefits first vested, . . . " The First Circuit's *Puig v. Standard Dredging Corp.*, 599 F.2d 467 decision that same year demonstrated the critical consideration the time of death is given, applying the 1972 amendments to the LHWCA's § 909 award of death benefits to a 1975 death claim arising from a 1964 injury. The 1972 amendments provided for payment of death benefits to surviving widows and children if the injury caused death, or if the employee sustained permanent, total disability due to the injury but died from causes other than the injury.[4] The employee died in 1975 from causes unrelated to the injury, and employer controverted the claim for death benefits, relying on § 909 in its pre-1972 state. The First

[4] Section 909 was amended in 1984 to require a connection between the cause of death and injury.

Circuit affirmed the Benefits Review Board's decision that because the right to death benefits arises only upon death and is separate and distinct from the right to disability benefits, § 909 as amended should be applied. The First Circuit well recognized that:

> The cases under the Longshoremen's Act have consistently held that the right to death benefits is separate and distinct from the right to disability benefits and does not arise until death occurs. "When death occurs, a new cause of action arises which requires an adjudication on all questions such as accident, notice of death, claim, causal relationship, and dependency." (Citations.)

Puig v. Standard Dredging Corp., supra, 599 F.2d at 469. The *Puig* court later confirmed that "the critical time for death benefits is the time of death, when the § 909 right arises."

Section 33(g)'s language makes clear that only those persons actually and presently "entitled" to benefits come within § 33(g)'s forfeiture provisions. Where a statute's meaning is plain, "the Board and reviewing courts 'must give effect to the unambiguously expressed intent of Congress.' " *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 834 (1984); *Holly Farms Corp. v. National Labor Relations Board*, 116 S.Ct. 1396, 1401 (1996). The Fifth Circuit's adherence to the language of § 33(g) follows these well established principles of statutory construction. The Ninth Circuit's attempts to broaden § 33(g)'s harsh bar violate these principles, and the language of the Act itself. Adherence to this Court's own decision in *Cowart* requires affirmation of the Court's decision below.

The *Cretan* court believed it necessary to go beyond the letter of the statute in order to protect an employer's potential credit rights outlined in § 33(f). Yet, Congress did not provide protection for **potential** employer credit, being concerned only with present, vested rights. In its eagerness to protect what it perceived were the overriding purposes of § 33(f) (protect employer's credit rights at all costs), the court went beyond the concerns of Congress, and beyond its role as an interpreter of existing law, as will be explained below.

B. Congress Intended to Protect Only Present Rights, Not Employer's Potential Rights

The language of the statute is the guidepost to Congress' intent.

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the Legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases, we have followed their plain meaning.

U.S. v. American Trucking Associations, Inc., et al., 310 U.S. 534, 543 (1939). Section 33, in its entirety, is an inextricably intertwined, remedial scheme designed to protect persons **presently** "entitled" to compensation and, on balance, to protect the employers' equally vested rights to subrogation from third party tortfeasors. When read as an integrated whole, the statute's purpose is clear. Subdivision 33(a) explains that "if on account of a disability or death for which **compensation is payable** under this chapter, the **person entitled to such compensation**

. . . need not elect whether to receive such compensation or to recover damages against such third person." The claimant plainly may seek both. To ensure the third party action is pursued, subdivision 33(b) assigned the employer "of all rights of the person, entitled to compensation to recover damages against such third person" if the claimant does not sue the third party tortfeasor within six months of acceptance of compensation under an award in a compensation order. Congress' automatic assignment of the claimant's then-rights to sue the responsible third party to the employer who paid the compensation the injured worker accepted, clearly evidences Congress' attempt to balance actual vested rights of the employee, already awarded compensation, with the employer's right to recover against third party tortfeasors the compensation paid. Thus, section 33(b) considers only **present** rights.

Congress' logical outline continues as § 33(c) provides that payment of compensation into the Special Fund established in 33 U.S.C. § 944 (when there is no "person entitled under this chapter to compensation for the death of an employee") operates as an assignment to the employer of the representative of the deceased to recover against a third party tortfeasor. Section 33(d) expressly provides that after the automatic § 33(b) or (c) assignment of rights, the employer may sue or settle with the third party. The assignment flows from the claimant or legal representative's right "to recover damages against such third person," (see § 33(b) and § 33(c)), that is from the "acceptance of compensation under an award in a compensation order" outlined in § 33(b), or the "payment of such compensation into the Special Fund,"

thus, once again, protecting the employer's **present** subrogation rights vested by actual payment of compensation. In other words, the Act balances the claimant's right to and receipt of compensation with the employer's subrogation rights.

Section 33(e) continues the balancing of **present** rights by dividing the proceeds of the employer's successful exercise of the § 33(b) or (c) automatic assignment, and includes a share for the "person entitled to compensation" or the representative. Section 33(e) again shows Congress' sole consideration of **present** rights by envisioning that payments had been made as compensation, see § 33(e)(1)(B), wherein the employer is allowed to retain amounts equal to "the cost of all benefits actually furnished by him to the employee under § 907 of this title (medical benefits)" and § 33(e)(1)(C)'s "all amounts paid as compensation."

Section 33(f) continues the balancing of rights when it opens with "if the person entitled to compensation," relates back to § 33(b), and describes the process when the claimant initiates proceedings against a third person. Section 33(f) includes a provision that ensures that the employer gets a credit, but details the conditions to that credit, that is, "if the person entitled to compensation" "institute proceedings within the period prescribed in subdivision (b) of this section," i.e., commences an action against a third person within six months after acceptance of compensation pursuant to an award in a compensation order. If that condition occurs, the employer has to pay benefits after a reduction by the amount the claimant collected from the third party, less what it cost the claimant to collect.

Section 33(g) provides further detail on the § 33(f) situation, where the claimant, rather than the employer, sues the third person. That detail protects the employer from the potential that the claimant who **presently** has rights to compensation might sell out the employer's **present** right to credit by settling for an amount that is insufficient to repay benefits the employer is liable to the claimant for. That rationale, which permeates the entire statute, simply does not apply if the claimant is not yet entitled to benefits.

Section 33(h) carries Congress' outline of the subject matter a practical step further. The insurer of an insured employer stands in the shoes of the employer with respect to "payment of the compensation" and thus is subrogated to the "rights of the employer." Section 33(i) completes Congress' outline with its provision that there is no right to elect a tort action against a third person who caused the worker's injury if that third party is an officer or employee of the injured worker's employer.

A complete view of § 33 highlights Congress' intent to balance the **present** rights of the employer and claimant. The employer's § 33(g) protected subrogation rights are balanced against the claimant's rights to actual longshore and civil compensation. Section 33 envisioned prompt payment of benefits to the injured worker. In fact, in 1959, Congress amended § 33(a) of the Act. Previously, § 33(a) required the employee to make an election between the receipt of compensation and a damages action against a third person. The 1959 amendments deleted the election of remedies requirement altogether because

> existing law was felt to "work a hardship on an employee by in effect forcing him to take compensation under the Act because of the risks involved in pursuing a lawsuit against a third party." S. Rep. No. 428, 86 Cong., 1st Session 2 (1959). The result was that an injured employee usually elects to take compensation for the simple reason that his expenses must be met immediately, not months or years after when he has won his lawsuit.

Bloomer v. Liberty Mutual Insurance Company, 445 U.S. 74, 80 (1979). The court further stated, "Responding to this inequity, the 1959 amendment provided that even when compensation was paid pursuant to an award of the deputy commissioner, the longshoreman's right of action would not be assigned to the stevedore until six months from the date of the award." (*Id.*) Thus, Congress envisioned a claimant presently, and actually receiving benefits to be those § 33 reaches. As the *Bloomer* court stated,

> Compensation award was intended to be an immediate and readily available payment to the injured longshoreman. By receiving this payment, the longshoreman was not foreclosed from pursuing an action against the ship owner.

By dealing only with present rights to compensation, and assigning the injured worker's right to sue only after compensation was paid pursuant to an award, Congress clearly limited its employer protections to rights presently accrued, and did not intend to protect through the harsh bar of § 33(g) employer's mere expectancy of credit. Section 33(g), forfeiting the person entitled to compensation's statutory right to benefits, is considered by this Court to be a "forfeiture penalty" which "creates a

trap for the unwary" (*Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. at p. 483). In other words, § 33(g)'s forfeiture provision is a waiver of statutory rights, which, as such, warrants strict construction:

> We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is "explicitly stated." More succinctly, the waiver must be clear and unmistakable.

Metropolitan Edison Company v. NLRB, 460 U.S. 693, 708 (1982); see also *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 410 (1988) ("before deciding whether such a state-law bar to waiver could be preempted under federal law by the parties to a collective bargaining agreement, we would require 'clear and unmistakable' evidence, see *Metropolitan Edison Company v. NLRB*, 460 U.S. 693, 708 (1982), in order to conclude that such a waiver had been intended.")

The § 33(g) waiver limits its "harsh effects" to those rights presently entitled by both the employer and the employee. This limitation corresponds with the Act's concern with only those rights in existence. For example, rights to longshore compensation can be settled, but only compensation to which the claimant is presently entitled. An injured employee can settle his rights to compensation or medical benefits, but not his survivors' rights to death benefits. 20 C.F.R. § 702.241(g).[5] *Cortner v. Chevron*

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[5] 20 C.F.R. § 702.241(g) provides in full:

> An agreement among the parties to settle a claim is limited to the rights of the parties and to claims then in existence: settlement of disability compensation or

International Oil Company, Inc., 22 BRBS 218 (1989), which invalidated an employee's attempt to settle his spouse's entitlement to survivor's benefits, is instructive. There, employer argued § 908(i) of the Act provided for settlement by "the parties to any claim." The Board responded as follows:

> The "party" to the claim for purposes of § 8(i), however, is the employee. His spouse is not a party to the disability claim. During the employee's lifetime, she has no right to file a claim for benefits and the statute does not authorize a person who is not a party to a disability claim to settle any potential or future survivors' claims. The amendments to § 8(i) allow for the settlement of actual claims for benefits brought by survivors following the death of the employee. It is not until death occurs that the right to benefits arises and the potential beneficiaries are identified.
>
> Section 702.241(g) complements the statutory provision, as it explicitly states what is implicit in the statute – that settlement of a claim is "limited to the rights of the parties and to claims then in existence." 20 C.F.R. § 702.241(g). Since claimant was alive at the time of settlement, there was no claim for survivors' benefits in existence at the time of settlement. Thus, both the regulation and the statute prohibit settlement of the right to survivors' benefits before it

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medical benefits shall not be a settlement of survivor benefits nor shall the settlement affect, in any way, the right of survivors to file a claim for survivors' benefits.

> arises, i.e., before the death of the injured worker.

Id. at p. 220. Congress' limitation on settlement of rights thus is confined to rights then in existence, as evidenced in § 8(i) and § 33. *Cretan* went beyond Congress' balancing of present rights, weighing the employer's potential credit rights far above a claimant's potential right to death benefits. Congress clearly did not intend such a disparate disregard for its carefully crafted balance of rights, a balance which must be corrected by this Court.

C. Liberal Interpretation of the LHWCA Supports the Fifth Circuit Decision

The plain language of the Act and Congress' intent is in harmony with the liberal policies demanded in interpretation of the LHWCA. Congress enacted this humanitarian Act to require

> employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to the employer. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and . . . to those served by them. **They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted, and, if possible, so as to avoid incongruous and harsh results**. (Emphasis added.)

Baltimore and Phila. Steamboat Company, et al. v. Norton, Deputy Commissioner, et al., 284 U.S. 408, 414 (1932); *Voris v. Eikel*, 346 U.S. 328, 333 (1953). In furtherance of these goals, all doubts, factual as well as legal, must be resolved in favor of the injured worker in order "to place the burden of possible error on those best able to bear it." *Jones v. Director, OWCP, U.S. Department of Labor*, 977 F.2d 1106, 1109 (7th Cir. 1992). If any inequity is present in § 33, that inequity must be borne by the employer unless required by the Act:

> Some inequity appears inevitable in the present statutory scheme, but we find nothing to indicate and should not presume that Congress intended to place the burden of the inequity on the longshoreman whom the Act seeks to protect.

Edmonds v. Compagnie Generale Transatl., 443 U.S. 256, 270 (1979). Specifically, in interpreting § 33(g),

> In the absence of language demanding it, construction is not to be favored which visits a forfeiture on the employee or his dependent and gives a windfall to the insurance carrier.

Bell v. O'Hearne, 284 F.2d 777, 781 (4th Cir. 1960). The Act's liberal policies and the plain language of the statute do not require a forfeiture be brought upon a person who settles third party potential rights before that person becomes "entitled to compensation."

Public policy also does not support the employer's proposed construction of § 33(g). In cases where this type of situation arises, the employee is injured through the fault of a third party, and pursues a civil action at the same time as the compensation action. The employee and

the spouse are offered a third party settlement which would release all possible actions by both the employee and the spouse. If the spouse does not waive her future rights, the settlement does not go through, the third party defendants wanting to buy their peace once and for all. Consequently, the employee is forced to go to trial against a third party tortfeasor, clogging the courts with cases that need not be tried and costing businesses immense litigation expenses.

On the other hand, if the widow is allowed to settle her potential action without fear of forfeiture, third party actions can be settled, with the employer still receiving the benefit of credit toward its liability for compensation to the employee. This construction is more in line with Congress' intent to balance the rights of the employer and the employee. Moreover, this construction allows the employer and employee to get the benefits of the bargain; that the person entitled to compensation would be allowed prompt payment in exchange for the employer's subrogation rights. Spouses, of course, would not get the benefit of this bargain if their future compensation rights were terminated before they were entitled to payment. Their guarantee of prompt payment is waived before they even become entitled to payment.

The Fifth Circuit's correct construction of § 33(g), which should be used in § 33(f), may confer upon the employer the harsh effect of denial of credit for some wrongful death recoveries made by a potential claimant. However, the Act's language shows Congress' policy choices in extending the bar only to those actually entitled to compensation. As this court said in *Badaracco, et al.*

v. Commissioner of Internal Revenue, 464 U.S. 386, 398 (1984):

> The cases before us, however, concern the construction of existing statutes. The relevant question is not whether, as an abstract matter, the rule advocated by petitioners accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment . . . Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.

The fact that Congress intended only to cover those rights in existence is clear through an unbiased reading of §§ 8(i) and 33. Of course, section 33(g)'s provisions may be deemed harsh at times, see *Cowart & Gibson v. ITO Corporation of Ameriport*, 18 BRBS 162 (nothing in § 33(g) compels the employer to consent to settlement or to consider a proposed settlement in good faith), yet this harshness cannot override Congress' plain language and intent:

> Congress has spoken with great clarity to the precise question raised by this case. It is the duty of the courts to enforce the judgement of the legislature, however much we might question its wisdom or fairness. Often we have urged the Congress to speak with greater clarity, and in this statute it has done so. If the effects of the law are be alleviated, that is within the providence of the legislature. It is Congress that has the authority to change the statute, not for the courts.

Estate of Cowart v. Nicholas Drilling Co., supra, 505 U.S. at pp. 483-484.

Any lessons to be learned here are governed by the teachings of *United Brand Company v. Melson*, 594 F.2d 1068 (5th Cir. 1979). There, the Fifth Circuit admitted the LHWCA did not contain any provision allowing employer credit for payments made from a state compensation action. The Fifth Circuit took the correct view:

> Under the Act, United Brand is fully liable for Melson's injury. Melson's recovery from Micknick is a mere fortuity. To allow United Brands a set off is to give United Brands a windfall in the amount of Melson's state award. Until Congress is moved by this unusual situation, we think that the solution to this difficult problem is to allow the windfall of double recovery to reside with the injured worker rather than to allow the set off windfall to accrue to United Brands.

Id. at p. 1075. Congress went on to correct this inequity in 1984, when it amended section 903(e) to include a credit against employer liability for benefits paid pursuant to any other workers' compensation law. This court should follow the Fifth Circuit's applaudable restraint and confine itself to its position, that of an interpreter of existing law, not an inventor of law.

II. CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed, continuing this Court's consistent deference to Congress' intent.

Respectfully submitted,

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